UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA OFFICE

VALERO SERVICES CORPORATION1

and Case No. 16-CA-75476

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), LOCAL UNION 13-423, AFL-CIO

David A. Foley, Esq.
for the General Counsel.

Mark Stubley, Esq. & John T. Merrell, Esq.
for the Respondent.

Bernard L. Middleton, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Houston, Texas on August 9, 2012. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), Local Union 13-423, AFL-CIO (the Union) filed the charge in this case on February 27, 2012 and the Acting General Counsel issued the complaint in this matter on May 30, 2012. The sole allegation in the complaint is that the Respondent, Valero Services Corporation, violated Section 8(a)(1) and (5) of the Act by failing and refusing to timely furnish information requested by the Union. On June 13, 2012, the Respondent filed its answer to the complaint denying the alleged unfair labor practice and asserting several affirmative defenses, which will be addressed as necessary later.

¹ The name of the Respondent was amended at the hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

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FINDINGS OF FACT

I. JURISDICTION

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The Respondent, a Delaware corporation, annually provides employee leasing services in excess of \$50,000 to the owners of the Port Arthur, Texas refinery, the facility at issue here, as well as refineries operated in other states within the United States. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2). (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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The Union, or its predecessor, has represented a unit of employees at the Port Arthur refinery since an initial certification dated March 20, 1943. The unit has been amended over the years through various decisions of the Board, as set forth in Article I of the collective bargaining agreement. The unit, as defined in the contract, consists of:

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All Operating and Maintenance employees of the Company's Port Arthur, Texas, Refinery, including employees engaged in loading and discharging bulk cargoes on and from tankers and barges at said Refinery; excluding executives, supervisory employees, clerical employees, watchmen, graduate engineers, chemists performing analytical work, monthly-paid employees performing testing work who have been in the employ of the Company for less than a year; also excluding employees in units previously established, said units being the Electrical and Machinist departments, and employees engaged in the bricklaying and masonry trades (except Bricklayer Helpers) and their apprentices.

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The collective bargaining agreement in effect at the time of the alleged unfair labor practice was effective for the period February 1, 2009 to February 1, 2012.² The parties began their negotiations for a successor agreement on or about January 16 and reached an agreement on February 2.

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The Respondent admitted in its answer that, on November 30, 2011, and again on January 12, the Union, in writing, requested the follow information:

A copy of any and all security guard reports, notes or other information used in the company's decision to terminate Kent Miguez.

² All dates are in 2012 unless otherwise indicated.

The undisputed evidence at the hearing establishes that the Respondent did not furnish this information to the Union until about April 17, a date after the unfair labor practice charge was filed and served upon the Respondent.

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Robert Hollis, the Chairman of the Union's Workmen's Committee from 1997 until April 2012, wrote the November 2011 request for information at issue here. He testified that he went on vacation after making the request and did not return until January 2. Bruce McPherson, the vice chairman at the time, took over his responsibilities during Hollis' absence. McPherson testified that he followed up on Hollis' request by asking Brad Dierlam, the Respondent's Human Resources Manager at the Port Arthur facility, on December 6, 2011, if Dierlam was going to be able to get the information from the security guards. According to McPherson, Dierlam responded, "we're working on it." Hollis renewed his request on January 12, after his return from vacation, when he learned the information had not been provided. Hollis testified that he also spoke to Dierlam, in about mid-January, when the two were discussing preparations for contract negotiations, and asked when the Union would be getting the security guard reports. According to Hollis, Dierlam responded in the same fashion, i.e. "we're working on it." Hollis had no further contact with Dierlam about this information request until sometime in mid-February, after contract negotiations had concluded. At that time, according to Hollis, Dierlam told him that the Respondent was in the process of getting the new Human Resources Manager up to date and that they were "working on it." Dierlam did not specifically deny having these conversations with McPherson and Hollis. He testified that he could not recall whether he spoke to them specifically about the information request but acknowledged that he had frequent contact with both men during the relevant time period. Dierlam also conceded that he may very well have told them he was "working on it" as this is a customary response for him.

The evidence shows that Miguez, a long-term unit employee, was terminated on May 12, 2011 after he was caught entering the refinery with a pistol in his vehicle. The Union filed a grievance on May 13, 2011 that was denied by the Respondent at the first two steps of the grievance procedure. On May 19, 2011, after the second step denial, Hollis made the first information request in this matter. He requested, by letter, that the Respondent furnish the Union with "all records and documents which disclose in whole and/or in part, directly and/or indirectly the reasons for its decision to terminate Kent Miguez." Hollis acknowledged that he received some information in response to this request on June 2, 2011. However, the Respondent did not include in its submission any reports from the security guards who stopped Miguez and searched his vehicle prior to his termination. There is no dispute that the Union did not follow up on its request at that time.

The parties continued to process the Miguez grievance. The parties discussed this and other grievances at a regular monthly meeting on June 24, 2011with no resolution. On July 18, 2011, the Union filed a formal written complaint and grievance under the terms of the collective bargaining agreement. The Respondent submitted its written denial of the grievance on July 20, 2011. There is no dispute that the Union took the position throughout that not only was Miguez termination unjust, but that the discipline was excessive considering his length of service with the company and his claim that the alleged violation of company rules regarding guns was inadvertent. On September 9, 2011, the Union notified the Respondent of its intent

to arbitrate the Miguez grievance. On September 16, 2011, the Respondent notified the Union that it was refusing to arbitrate the Miguez grievance on the basis that the request to arbitrate was untimely under the contract.³ The Respondent reiterated this position in an e-mail dated October 31, 2011 denying Hollis request to pick an arbitrator for the Miguez grievance. Hollis testified that, in March, the Union filed a complaint in federal court to compel arbitration, which was still pending at the time of the hearing.

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While acknowledging that it did not furnish the information at issue until April 17, the Respondent takes the position that the Union did not need the information because it never disputed the Respondent's claim that Miguez had a gun in his vehicle when he attempted to enter the facility. The Respondent also contends that it was not obligated to furnish the information because the grievance was closed when the Union failed to request arbitration within the contractual time limits. Finally, the Respondent argues that its delay in responding to this request was reasonable in light of the numerous other requests for information that the Union made between the Fall 2011 and February 2 in relation to contract negotiations.

Dierlam, the Respondent's Human Resource Manager testified for the Respondent regarding events occurring during the time that the Union's request for information on Miguez' grievance was pending. For example, Dierlam testified that Stephen Potts, the Director of Human Resources at the refinery at the time of Miguez' termination who represented the Respondent in the grievance procedure, left the company in November 2011. Dierlam testified that the Respondent also lost a secretary in Human Resources around the same time. This left Dierlam and three human resources specialist to run the department. The reduction in staff coincided with the Respondent's preparation for contract negotiations involving five bargaining units represented by this and other unions scheduled to commence in January. Dierlam also testified that, sometime in late September or early October 2011, the Union submitted a list of 165 questions regarding purported discrepancies in a new benefits booklet due to be issued for the next calendar year. After discussions with the Union regarding these questions at the regular monthly meeting on or about October 24, 2011, the Respondent started the process of compiling the information needed to respond to the 165 questions. This information request was finally complied with in mid-February. Dierlam conceded that the response to these questions was handled primarily by the Respondent's corporate human resources staff in San Antonio.

Dierlam testified that, in preparation for contract negotiations, the Respondent made a decision that it would continue to operate the refinery in the event of a strike by using salaried, non-unit personnel from Port Arthur and other Valero facilities. Dierlam testified that he was responsible for arranging for training of these replacements and arranging for temporary housing and provision of meals for them on-site. Dierlam testified further that, while these preparations were going on, the Union began submitting information requests in preparation for negotiations. Dierlam acknowledged that, because the parties engage in

³ Article XIX, Section (A)(5) provides: "In any event, intention to arbitrate must be given within fifteen (15) days following the date of receipt of the Management's decision or if Management makes no decision, intention to arbitrate must be given within thirty (30) days after the date the matter was referred to Management."

pattern bargaining, many of the proposals and related requests for information are handled at the corporate level between human resources personnel in San Antonio and the Union's international office. However, once the parties began meeting, almost daily, starting around January 16, the Union made information requests each day, seeking information regarding claims being made by the Respondent in support of its contract proposals. These requests typically demanded that the information be provided at the next bargaining session. the Respondent placed in evidence all of the requests submitted by the Union from January 16 to January 29. The Respondent also produced at the hearing, but did not place in evidence, several boxes of documents which were submitted to the Union during this time period in response to these requests. There is no dispute that, once the parties reached agreement on a new contract, about February 2, the Union withdrew all of the pending contract-related information requests and no further requests were made.

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The security guard reports that were ultimately furnished to the Union on April 17 consists of 12 pages. These reports were prepared by guards employed by Allied Barton Security Services, the contractor used by the Respondent to provide security services at the refinery. Although the reports are maintained by and in the possession of Allied Barton, Dierlam and Gary Byrd, the Respondent's Vice President of Labor Relations and Human Resources whose office is in San Antonio, testified that the Respondent has utilized and relied upon such reports in making decisions regarding the discipline of unit employees. The Respondent also stipulated at the hearing that these very reports were in the possession of the Respondent's counsel on November 14, 2011, when the Respondent submitted a position letter to the Board's regional office in response to another charge filed by the Union that was withdrawn. Neither of the Respondent's witnesses testified to any difficulties in obtaining these reports from Allied Barton.⁴

It is well-established that a union is entitled to whatever information is relevant and necessary to its representation of the bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration. *NLRB v. Acme Industrial Company*, 385 U.S. 432, 435, 436 (1967); *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 889-890 (7th Cir. 1985); *General Motors Corp v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983), enfg. 257 NLRB 1068 (1981); *SBC Midwest*, 346 NLRB 62, 64 (2005). In *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), citing *General Electric*, 290 NLRB 1138, at 1147, the Board held that: "Once a union has made a good faith request for information, the Employer must provide relevant information reasonably promptly, in useful form." The test utilized by the Board for determining whether a Respondent has supplied the information in a reasonable amount of time is that set forth in *West Penn Power Company*, 339 NLRB 585, 587, (2003), enfd. in pertinent part 349 F.3d 233 (4th Cir. 2005). Accord: *Earthgrains Company*, 349 NLRB 389:

In determining whether an Employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well-established that the duty to furnish

⁴ Although Dierlam and Byrd claimed that the Respondent did not rely on these reports in terminating Miguez, neither was directly involved in making the decision. That was Potts' responsibility and he did not testify for the Respondent.

requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.

The Respondent initially argues on brief that the information at issue here was not relevant to the Union's performance of its statutory representative function, relying on its claim that the Union's request for arbitration of the Miguez grievance was untimely. In the Respondent's view, the Union has no need for the security guard reports until such time as a district court has ruled on the Union's suit to compel arbitration and directed the parties to arbitrate. This argument construes the Union's representative function too narrowly. The Union's duty to represent unit employees extends beyond its representation of Miguez. Information contained in these reports is not only useful in defending Miguez in a termination grievance but also in educating other unit employees regarding how the Respondent applies its policies in the workplace. While it is true that the Union went ahead and made its request to arbitrate and filed its suit to compel arbitration without having access to these reports, this does not mean, as the Respondent argues, that the information was unnecessary. Had the Union been provided this information, it may very well have made a reasoned and wellinformed decision not to pursue the grievance any further. Without the information, the Union had no choice but to pursue the matter to avoid any claim that it had breached its duty to represent Miguez.

In any event, as counsel for the Acting General Counsel notes in his brief, the Board recently held that "an employer is required to provide such [relevant] information regardless of the potential merits of a grievance...even if the employer has a colorable procedural defense to the grievance...Consequently, even if the Respondent could maintain a valid timeliness defense against the grievance, it unlawfully refused to provide the requested relevant information." *Des Moines Cold Storage, Inc.*, 358 NLRB No. 58, slip op. at p. 2 (June 15, 2012) and cases cited therein. See also, *Albertson's*, 351 NLRB 254, 344 (2007). It is also significant that the Respondent never advised the Union that it was refusing to furnish the security guard reports because it considered the Miguez grievance untimely. On the contrary, the credible evidence shows that Dierlam merely told Hollis and McPherson, when asked, that the Respondent "was working on it."

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The Respondent also argues that any delay in providing this information was reasonable in light of the totality of circumstances, including the number and volume of other information requests that the Union made between October 2011 and January 29 related to the new benefits handbook and contract negotiations. These multiple requests also came at a time when the Respondent had suffered a loss of staff in the human resources department and when it was facing contract negotiations involving five bargaining units, including the one at issue here. In the Respondent's view, it reasonably prioritized the information requests and gave the one at issue a low priority because the Union had not acted as if it had a high priority. The Miguez grievance had been denied in July and the Union had not pursued it since the Respondent raised the timeliness issue in September. In the Respondent's view, there was nothing pending at the time that would make the need for this information urgent. In contrast,

negotiations were expected to start in January with a contract expiration date of February 2, by which time the parties would either have an agreement or a potential strike.

The Respondent's argument is appealing. The evidence clearly shows that the Union was not very diligent in pursuing this information. On June 2, 2011, the Respondent promptly furnished the Union, upon request, with information regarding Miguez' termination. Even though the Union was aware of the involvement of Allied Barton guards in the incident that led to Miguez' termination, the Union did not ask for the guards' reports when the Respondent failed to include them with the information provided on June 2. Not until almost six months later, on November 30, 2011, did the Union make such a request. And this request was made more than four months after the Respondent's last answer denying the grievance on July 20, 2011 and more than two months after the Respondent denied the Union's request to arbitrate the grievance on the basis of timeliness. How could one fault the employer for not acting more expeditiously when faced with this request under these circumstances?

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Despite the appeal of the Respondent's argument, I feel constrained to find that the delay in providing the security guard reports at issue here was unreasonable. I note that the guards' reports were not complex or voluminous, were readily available to the Respondent and easy to retrieve. In fact, the Respondent's counsel already had them and had submitted them to the Board's regional office before the Union made its November 30, 2011 request. In addition, the request came into the Respondent's human resources office more than a month before the Union began its daily onslaught of information requests related to contract negotiations. The only requests pending at the time were the request from the International Union for data related to pattern bargaining subjects, most of which were handled by the corporate office, and the 165 questions regarding the benefits handbook, again much of which was handled by corporate. There is simply no excuse for the Respondent to have ignored such a simple request as that contained in the November 30, 2011 letter. Moreover, any doubt whether the Union really needed or wanted this information after the passage of so much time was answered when McPherson followed up on the request verbally on December 6 and when Hollis renewed the written request on January 12. It is worth noting that, in response to these written and oral requests. Dierlam never made the excuse that the Respondent was too busy with other matters to respond, or that the Respondent questioned the Union's continuing need for the security guards' reports. On the contrary, he told Hollis and McPherson that he was "working on it."

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Accordingly, I find under the totality of circumstances here that the Respondent's approximately 4½ months delay in furnishing the Union with the security guards reports regarding Miguez was unreasonable and a violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint.

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CONCLUSIONS OF LAW

By failing and refusing to timely furnish the Union with relevant and necessary information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Because the Respondent has already furnished the Union with the information in dispute, I shall not recommend an affirmative order that it do so. I shall recommend that the Respondent post and abide by the attached Notice and that, consistent with the Board's decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), the notice be distributed electronically if the Respondent customarily communicates with its employees in that manner. This question can be resolved at the compliance phase of this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

15 Order

The Respondent, Valero Services Corporation, Port Arthur, Texas, its officers, agents, successors, and assigns, shall

20 1. Cease and desist from

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- (a) Failing and refusing to furnish United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), Local 13-423, AFL-CIO (the Union), upon request, with relevant and necessary information in a timely manner.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its facility in Port Arthur, Texas copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2011

- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- Dated, Washington, D.C. September 26, 2012

Michael A. Marcionese Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), Local 13-423, AFL-CIO (the Union), upon request, with relevant and necessary information in a timely manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

		VALERO SERVICES CORPORATION (Employer)	
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178 (817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2925.